

Regulation of Disclosure of Economic and Financial Data and the Impact on the American System of Labor-Management Relations

LESLIE K. SHEDLIN*

I. INTRODUCTION

Despite all homage paid to the existence of an employer's statutory obligation to furnish information to a union,¹ the National Labor Relations Act² (the NLRA or the Act) is painfully silent on this point. Rather, the courts and the National Labor Relations Board (the NLRB or the Board) have found a disclosure requirement in the duty to bargain in good faith mandated by sections 8(a)(5)³ and 8(d)⁴ of the Act. The dearth of legislative history in connection with the enactment of these two sections indicates that the absence of a disclosure requirement was not a conscious omission by the drafters, but rather a failure either to take notice of the problem or to understand it. In the area of wages and hours—where the union's need for information has been deemed most critical—the courts and the Board have developed a substantial body of law regulating an employer's duty to disclose. In other areas of economic data, however, the disclosure issue has arisen with less frequency, at least in part because unions rarely attempt to expand the scope of information available to them under the broad language of the case law.

American disclosure rules are predicated on an adversary system of labor relations. After considering the present state of the law and the prospects for expanding the present disclosure requirements beyond the arena of wage and wage-related data, this Article will consider means of improving cooperation between management and labor through greater disclosure of information to unions, and whether these means should be accomplished by further judicial or quasi-judicial inventiveness, or by statute or regulation modeled upon the experiences of Belgium, Great Britain, and West Germany. Finally, this Article will focus upon the role of disclosure in shaping the future direction of American labor-management relations.

II. STATUS OF DISCLOSURE UNDER EXISTING LAW

A. *Availability of Wage and Wage-Related Data*

Congress' asserted purpose in enacting a comprehensive labor

* Attorney, City of New York Law Department, J.D., University of Pennsylvania, 1979

1. See, e.g., B. GOTTLIEB & C. WERNER, STATUTORY OBLIGATION OF AN EMPLOYER TO FURNISH INFORMATION TO A UNION (rev. ed. 1975) [hereinafter cited as GOTTLIEB & WERNER].

2. National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976).

3. *Id.* at § 158(a)(5).

4. *Id.* at § 158(d).

relations statute in 1935⁵ was to pave "the way for cooperation and mutual progress" towards the goal of promoting industrial peace.⁶ Section 8(a)(5) of the Act imposes on each employer the duty to bargain collectively with the representative of its employees.⁷ Section 8(d) of the Act, added in 1947, defines the scope of this duty as extending to all matters relating to "wages, hours, and other terms and conditions of employment."⁸

In order for a certified union to fulfill successfully its role as the collective bargaining representative of its members, it must be able to secure the knowledge necessary to formulate reasonable demands upon the employer and to engage in reasoned decision-making.⁹ These informational needs of a union are not limited only to its role in negotiation of collective agreements, but rather extend far beyond to include contract administration as well.¹⁰ In response to these union needs, the courts and the Board have superimposed upon an employer's statutory obligation to bargain a duty to furnish the union with data relevant and necessary to the union's functions as collective bargaining agent.¹¹

A union's request for information is to be judged by a standard of relevancy imported to the labor-management relations area from the

5. National Labor Relations Act, 49 Stat. 449 (1935), *as amended by* 61 Stat. 136 (1947), 65 Stat. 601 (1951), 72 Stat. 945 (1958), 73 Stat. 541 (1959), 88 Stat. 395 (1974) [codified at 29 U.S.C. § 151-169 (1976)].

6. 79 CONG. REC. 7661 (1954) (remarks of Sen. Walsh).

7. National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976).

8. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1976).

9. *See* NLRB v. Whittin Mach. Works, 217 F.2d 593, 594 (4th Cir. 1954); *Anaconda Am. Brass*, 148 N.L.R.B. 474, 478 (1964).

10. NLRB v. Acme Indus. Co., 385 U.S. 432, 437 (1967).

11. These data have been found to include: lists of names and addresses of unit employees, *see, e.g.,* *United Aircraft Corp. v. NLRB*, 434 F.2d 1198 (2d Cir. 1970), *cert. denied*, 401 U.S. 933 (1971); *Prudential Ins. Co. v. NLRB*, 412 F.2d 77 (2d Cir.), *cert. denied*, 396 U.S. 928 (1969); wage rates and job classifications, *see, e.g.,* *NLRB v. Rockwell Standard Corp.*, 410 F.2d 953 (6th Cir. 1969); *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965); *Boston Herald Traveler Corp. v. NLRB*, 223 F.2d 58 (1st Cir. 1955) (matching individual employees to job classifications, length of service and salaries); *NLRB v. Whittin Mach. Works*, 217 F.2d 593 (4th Cir. 1954); *NLRB v. Yawman & Erbe Mfg. Co.*, 187 F.2d 947 (2d Cir. 1951); *B. F. Diamond Constr. Co.*, 163 N.L.R.B. 161, *enforced per curiam*, 410 F.2d 462 (5th Cir. 1967), *cert. denied*, 396 U.S. 835 (1969); *Lock Joint Pipe Co.*, 141 N.L.R.B. 943 (1963); methods used by employers to establish wage rates, *see, e.g.,* *Fafnir Bearing Co. v. NLRB*, 362 F.2d 716 (2d Cir. 1966) (piece rates); *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746 (6th Cir. 1963), *cert. denied*, 376 U.S. 971 (1964); *J.I. Case Co. v. NLRB*, 253 F.2d 149 (7th Cir. 1958); *NLRB v. Otis Elevator Co.*, 208 F.2d 176 (2d Cir. 1953) (time study data and methods of compiling same); *Glen Raven Knitting Mills*, 115 N.L.R.B. 422 (1956) *rev'd on other grounds*, 235 F.2d 413 (7th Cir. 1956) (data on style construction where related to piece wage rates); *Skyland Hosiery Mills*, 108 N.L.R.B. 1600 (1954) (rate used to determine lost time as to each employee); benefits, *see, e.g.,* *Sylvania Elec. Prod., Inc. v. NLRB*, 358 F.2d 591 (1st Cir. 1966) *cert. denied*, 385 U.S. 852 (1966) (information regarding welfare fund, where union seeks it to make choice between welfare benefits and take home pay); *Cone Mills Corp.*, 169 N.L.R.B. 449 (1968), *modified on other grounds*, 413 F.2d 445 (4th Cir. 1969) (actuarial assumptions underlying pension plan); *Reed & Prince Mfg. Co.*, 96 N.L.R.B. 850 (1951), *enforced*, 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953) (pension data); overtime hours worked by unit employees, *see, e.g.,* *Gulf State Asphalt Co.*, 178 N.L.R.B. 405 (1969); job evaluation, *see, e.g.,* *Anaconda Am. Brass*, 148 N.L.R.B. 474 (1964); *New Britain Mach.*, 105 N.L.R.B. 646 (1953) *enforced*, 210 F.2d 61 (2d Cir. 1954); *Reed & Prince Mfg. Co.*, 96 N.L.R.B. 850 (1951), *enforced*, 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953); and profit sharing, *see, e.g.,* *NLRB v. Frontier Homes Corp.*, 371 F.2d 974 (8th Cir. 1967) (employer must furnish price list where necessary to determination of profit sharing).

Federal Rules of Civil Procedure.¹² When wage or wage-related data have been requested by the union, a presumption of relevance has been found to attach; thus, the union need not adduce specific evidence of relevance before the employer's duty to disclose arises.¹³ When the requested information is deemed to be presumptively relevant, the employer cannot set up a defense of confidentiality,¹⁴ nor can he claim a good faith belief that he is not required to bargain with the union.¹⁵ Moreover, it does not matter that the union has an ulterior motive in requesting the information, so long as the union's anterior purpose falls within the sphere of legitimacy.¹⁶

A similar presumption of relevance, however, has not been found to attach to information other than wage and wage-related data. In such an instance, the burden is placed on the union to prove the information's relevance to a mandatory subject of collective bargaining,¹⁷ without reference to the merits of the underlying claim.¹⁸ At least one court, the Third Circuit Court of Appeals in *Curtiss-Wright Corp. v. NLRB*,¹⁹ has gone so far as to hold that once the union meets its burden by showing the relevance of the requested information, it is a per se violation of section 8(a)(5) for the employer to refuse to furnish the information.²⁰

In addition to a union request for relevant information, an obligation to disclose may also be triggered by the employer itself. If an employer asserts, either by an explicit statement or by a pretextual rationale that tends to obscure its true motives, its financial inability to meet the

12. See *NLRB v. Jawman & Erbe Mfg. Co.*, 187 F.2d 947, 949 (2d Cir. 1951).

13. While a brief discussion of the distinction between wage data and other economic data is necessary for the purposes of this Article, a more thorough explication of this subject has been undertaken elsewhere. See, e.g., GOTTLIEB & WERNER *supra* note 1; Bartosic and Hartley, *The Employer's Duty to Supply Information to the Union—A Study of the Interplay of Administrative and Judicial Rationalization*, 58 CORNELL L. REV. 23, 24-42 (1972); Fanning, *The Obligation to Furnish Information During the Contract Term*, 9 GA. L. REV. 375, 376 (1975); Huston, *Furnishing Information as an Element of the Employer's Good Faith Bargaining*, 35 U. DET. L. REV. 471, 493-99 (1958); Note, *Employer's Duty to Supply Economic Data for Collective Bargaining*, 57 COL. L. REV. 112, 119 (1957).

14. *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 754 (6th Cir. 1963), *cert. denied*, 376 U.S. 971 (1964).

15. *United Aircraft Corp. v. NLRB*, 434 F.2d 1198, 1207 (2d Cir. 1970), *cert. denied*, 401 U.S. 933 (1971). *Prudential Ins. Co. v. NLRB*, 412 F.2d 77, 84 (2d Cir.), *cert. denied*, 396 U.S. 928 (1969); *Utica Observer Dispatch*, 111 N.L.R.B. 58 (1955), *enforced*, 229 F.2d 575 (2d Cir. 1956).

16. For example, a request for subcontracting data will be granted when the work affected is that done by unit employees. See, e.g., *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967); *Puerto Rico Tel. Co. v. NLRB*, 359 F.2d 983 (1st Cir. 1966); *Fawcett Printing Corp.*, 201 N.L.R.B. 964 (1973); as will requests for information concerning nonunit employees when it is necessary to show erosion of the bargaining unit, see, e.g., *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1964). But see *NLRB v. Western Elec. Corp.*, 559 F.2d 1131 (8th Cir. 1977); *International Tel. & Tel. Corp. v. NLRB*, 382 F.2d 366 (3d Cir. 1967), *cert. denied*, 389 U.S. 1089 (1967) (information denied as being not necessary to union's performance of its duties).

17. *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3d Cir. 1964).

18. *NLRB v. Item Co.*, 220 F.2d 956 (5th Cir. 1955), *cert. denied*, 350 U.S. 836 (1955); *B.F. Diamond Constr. Co.*, 163 N.L.R.B. 161 (1967), *enforced per curiam*, 410 F.2d 462 (5th Cir. 1967), *cert. denied*, 396 U.S. 835 (1969); *Ingalls Shipbldg. Corp.*, 143 N.L.R.B. 712 (1963).

19. 347 F.2d 61 (3d Cir. 1964).

20. *Id.* at 69.

collective bargaining demands of the union, the employer brings upon itself an obligation to substantiate its claim by disclosure to the union of any relevant financial information.²¹

Despite the apparently strong presumption of relevance that adheres to wage and wage-related information, there is sufficient breadth in the language of the case law to enable an employer's obligation to disclose to be defeated through the combined effect of an enterprising employer and an uninformed union. In *NLRB v. Truitt Manufacturing Co.*,²² the United States Supreme Court left open this possibility by refusing to announce a per se rule on the duty to disclose, holding instead that an employer's refusal to disclose information requested by a union can be found to be an unfair labor practice violative of the duty to bargain in good faith only after consideration of all of the facts and circumstances of the particular case.²³ In certain limited circumstances, therefore, an employer can avoid the duty to disclose by showing, for example, that the information sought is of de minimis value to the union,²⁴ or that a striking union has requested a list of employees with no purpose other than to harass strikebreakers.²⁵ Additionally, an employer may at times avoid a duty to disclose, in the absence of a union request, by omitting reference to any cost issue in refusing to accede to a union's collective bargaining demands.²⁶

An employer-union conflict over the employer's obligation to disclose financial information can arise in any of three different contexts. First, the parties may disagree over the substance of the information, either as requested or as provided. Second, the union and employer may differ on the form in which the information will be supplied. An employer need not furnish information that, as a matter of routine business practice, it does not compile, or has not presently compiled into a manageable form.²⁷ Moreover, information that is under the control of an employer need not

21. The existence of an inability to pay claim as announced in *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *accord*, *Metlox Corp. v. NLRB*, 378 F.2d 728 (9th Cir.) *cert. denied*, 389 U.S. 103 (1967), will be found, for example, if the employer claims that meeting union proposals would render the company unable to maintain a proper balance of operations, *NY Printing Pressman v. NLRB*, 538 F.2d 496 (2d Cir. 1976), or if the employer asserts the necessity of maintaining his competitive position, *NLRB v. Western Wirebound Corp.*, 356 F.2d 88 (9th Cir. 1966); *accord*, *United Steelworkers v. NLRB*, 401 F.2d 434 (1968). *But see* *Dallas Gen. Drivers v. NLRB*, 355 F.2d 842 (D.C. Cir. 1966) (company's assertion it was already paying rates in excess of prevailing rates in same market does not amount to a claim of inability to pay); *Taylor Foundry Co.*, 141 N.L.R.B. 765 (1963), *enforced*, 338 F.2d 1003 (5th Cir. 1964) (employer's assertion that it would have to go out of business if the wage increase was granted, does not equal a claim of inability to pay).

22. 351 U.S. 149 (1956).

23. *Id.* at 153.

24. *See, e.g., NLRB v. Clegg*, 304 F.2d 168, 176 (8th Cir. 1962).

25. *Shell Oil Co. v. NLRB*, 457 F.2d 615, 620 (9th Cir. 1972); *Sign Pictorial Union v. NLRB*, 419 F.2d 726, 738 (D.C. Cir. 1969), *Little Rock Downtowners, Inc.*, 145 N.L.R.B. 1286, 1308 (1964), *enforcement denied on other grounds*, 341 F.2d 1020 (8th Cir. 1965).

26. *See, e.g., Sylvania Elec. Prod., Inc. v. NLRB*, 291 F.2d 128, 132 (1st Cir.), *cert. denied*, 368 U.S. 926 (1961) (company did not assert cost as a factor bearing on its willingness to consider union proposals regarding insurance coverage); *Roman Catholic Diocese of Brooklyn*, 236 N.L.R.B. 1 (1978) (diocese decision to close high school held a question of priorities, and not based on an inability to pay).

27. *See, e.g., Emeryville Research Center v. NLRB*, 441 F.2d 880 (9th Cir. 1971).

be compiled into the precise form requested by the union, but rather may be furnished to the union in its existing form.²⁸ If the union's request for financial data is stated broadly, the employer can select those vehicles through which the information will be conveyed to the union,²⁹ and can impose reasonable conditions on the union's use and manner of inspection of the materials.³⁰ A third union-employer conflict over disclosure of financial information can arise in the context of the timeliness of the union's attempt to secure the data. A union may lose its right to obtain disclosure by making its requests at a time when the information is not relevant to the subject matter at hand,³¹ or by engaging in dilatory tactics in the face of the employer's attempts to comply with the union's requests.³²

B. *Beyond the Presumption: Union Access to Broader Economic Data*

1. *Other Available Information*

Although the obligation of an employer to disclose relevant financial data appears to provide union access to a wide array of information necessary to allow the union to bargain collectively and to police an established labor agreement, closer analysis reveals that the information contemplated by the obligation is but a small segment of a much broader economic picture of the employer's enterprise. Information beyond the scope of the presumption of relevance but nevertheless an integral part of the management of a business includes, for example, management's assessments of profitability, production and sales data—including costs, time tables for production, and sales volume—information regarding products and inventory, sales volume—information regarding products and inventory, techniques and processes utilized by management in the

28. See, e.g., *Ingalls Shipbldg. Corp.*, 143 N.L.R.B. 712, 718 (1963).

29. See, e.g., *Food Serv. Co.*, 202 N.L.R.B. 790, 805 (1973) (when union's request for access to records is made in general terms, it is not a violation of the Act for the employer to grant access only to that information which the employer deems relevant).

30. See *Ingalls Shipbldg. Corp.*, 143 N.L.R.B. 712, 718 (1963) (if company believes there is information in the rate books which does not pertain to wage determinations, it can make the information relating to wages available in an alternate fashion); *Yakima Frozen Foods*, 130 N.L.R.B. 1269, 1272 (1961) (it is reasonable for company to insist that its books and records be audited by a qualified accountant who is not in the union's employ).

31. *Century Elec. Motor Co.*, 192 N.L.R.B. 941, 946 (1971) (union waited until two weeks after Christmas to request financial data to support the employer's refusal to pay Christmas bonuses); *Anaconda Am. Brass*, 148 N.L.R.B. 474, 478-79 (1964) (grievance had been dropped and request was stale).

32. See *Precision Casting Co.*, 233 N.L.R.B., 183, 210 (1977) (union made belated demand for books in an attempt to build a case against the company, and not in legitimate pursuance of a statutory right); *Alkahn Silk Label Co.*, 193 N.L.R.B., 167, 172 (1971) (union neither described the desired information accurately nor requested it in a timely manner); *Memorial Consultants, Inc.*, 153 N.L.R.B. 1, 14 (1965) (although the union requested books as to all employees and the company offered information only as to one group of employees to support its claims of inability to pay, the union never attempted to inspect what the company did offer); *Braswell Motor Freight Lines Inc.*, 141 N.L.R.B. 1154, 1163 (1963), *enforced*, 370 F.2d 226 (D.C. Cir. 1966) (union failed to frame its request properly, and then never attempted to examine the extensive information offered to it by management).

course of production, and long-range forecasts of expansion or contraction of the business. In addition to the general financial statements that are furnished to shareholders, which unions can obtain by the simple act of purchasing a share of stock, management has at its disposal a detailed breakdown of the financial posture of the enterprise, including methods of capitalization and amounts of dividends declared. Moreover, management often engages in a subjective analysis of the business, expressing in the form of opinions its conclusions about and predictions for the company.

Since this management-related information typically is not within the realm of wage and wage-related data, the presumptively relevant branch of the duty to disclose does not dictate automatic union access to it. Nevertheless, an employer may be required to disclose such management information to the union if the union carries its burden of showing that the information is relevant to a mandatory subject of collective bargaining.³³ Relevance, however, requires more than mere speculation by the union concerning the usefulness of the requested information.³⁴ Indeed, a showing that the requested information may prove interesting or helpful to the union may not, under the circumstances of the particular case, be a sufficient ground to compel employer disclosure.³⁵ Rather, to be relevant and thus within the scope of the employer's duty to disclose, there must be a probability that the requested information "is needed by the bargaining representative for the proper performance of its [collective bargaining] duties."³⁶

2. *Relevance of Non-Wage Data*

The broad variety of information compiled by management in the normal course of business gives rise to the question whether the concept of relevance, as applied under the duty to disclose, can be stretched to encompass it. One would expect that management would take a narrow view of the relevance concept, thereby excluding as much non-wage data as possible from the scope of the duty to disclose, while labor conversely would take an expansive view of the concept in an attempt to broaden the informational base from which it must collectively bargain. This divergence of views, and the resulting tendency to obscure the potential reach of the relevance concept, may stem at least in part from the manner in which the respective parties view their relationship with each other and their responsibilities to the interests that they individually represent.

Rather than develop a spirit of mutual cooperation and trust, labor and management have accepted a system in which both parties come to the

33. See *Western Mass. Elec. Co. v. NLRB*, 573 F.2d 101, 105 (1st Cir. 1978); *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3rd Cir. 1964); *General Aniline & Film Corp.*, 124 N.L.R.B. 1217, 1220 (1959).

34. *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 868 (9th Cir. 1977); *American Oil Co.*, 164 N.L.R.B. 29, 34 (1967).

35. *United Fireproof Warehouse Co. v. NLRB*, 356 F.2d 494, 498 (7th Cir. 1966).

36. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967).

bargaining table as adversaries and litigate to judgment each bargainable subject. Management sees its primary function as running the business as efficiently as possible. Its ultimate goals are profit maximization, full employment of resources, and low cost to consumers.³⁷ Management considers success to require quick, on-the-spot decisions, free of interference from employees or their representatives. This claim to noninterference is founded on the belief that, as representatives of the corporation's owners, management is exercising property rights subsumed under the heading of "management prerogatives."³⁸ Management traditionally has viewed any union attempt to impair the free exercise of its prerogatives as an intolerable intrusion on property rights.³⁹

Unions, on the other hand, see maintenance of employment security as a primary function. This goal, they feel, requires union involvement in any management decision that affects the workers.⁴⁰ Unions view themselves as requiring detailed financial and management-related data in order to negotiate and administer collective bargaining agreements, and to act as watchdogs over corporate practices.⁴¹

This stance by union and management has led to acceptance of the notion that the collective bargaining system is one in which both parties must view each other as adversaries. Each side sees this hard line as the crucial factor in its own survival. As a result, of two possible paths along which American labor-management relations could have proceeded—one of confrontation and the other of cooperation—a system of antagonism, nurtured by mistrust and deception on both sides, has emerged. To capitalize on the wisdom of Robert Frost, "the road not taken"⁴² by

37. D. CULLEN & M. GREENBAUM, *MANAGEMENT RIGHTS AND COLLECTIVE BARGAINING* 9 (1966).

38. *The President's National Labor Management Conference, Nov. 5-30, 1945*, Summary and Committee Reports, United States Department of Labor, Division of Labor Standards, BULLETIN No. 77, 57-59 (1947) [hereinafter cited as *President's Conference*]. Management summed up this area of control in its Report to the President's National Labor Management Conference in 1945, as being those matters with respect to which it was felt to be clearly the function and responsibility of management to make prompt initial decisions to ensure the effective operation of the enterprise, and clearly not subject to collective bargaining. These matters included the determination of products to be manufactured and services to be rendered to the customer, the location of the business including the establishment of new units and the relocation or closing of old units, the determination of layout and equipment to be used in business processes, techniques, methods and means of manufacture and distribution, materials to be used, size and character of inventory, determination of financial policies, general accounting procedures, prices of goods sold or services rendered, organization of each distribution unit, selection of employees for promotion, determination of job content, size of work force, allocation and assignment of work, policies as to employee selection, quality standards, maintenance of discipline and control, use of plant property, scheduling of operations and number of shifts, and determination of health, safety, and protections.

39. *Id.* One must bear in mind that this attitude reflects the stance management representatives were advocating in 1945, and whether they currently adhere to this line has become mooted over the past 35 years by amendment of the National Labor Relations Act to include § 8(d) and the subsequent expansion of the areas of bargainable subjects.

40. Platt, *The Duty to Bargain as Applied to Management Decisions*, 19 LABOR L.J. 143, 144 (1968).

41. Pillsburg, *Organized Labor's View of Corporate Financial Information*, 105 J. OF ACCOUNTANCY 46, 55 (1948).

42. *The Road Not Taken*, reprinted in *THE POETRY OF ROBERT FROST* 105 (E. LATHAM, ed. 1969).

American labor relations was one of cooperation and trust between the parties in an effort to arrive at mutual ends. It is with the American or antagonistic model in mind that one can begin to address the considerations that have defined the scope of the relevance concept of the duty to disclose, and to answer the question whether the road of antagonism that American labor relations has taken has in fact made "all the difference"⁴³ in the manner in which the disclosure rules have evolved.

The Board and the courts generally have accepted management's claim of a need for control of its business free from the constraints of union interference. As a result, the duty to disclose has been judicially and quasi-judicially constructed upon a foundation that consists, at least in part, of a management prerogatives rationale. Thus, when the information requested by the union does not fall within the category of wage and wage-related data, such that the presumption of relevance does not attach, but rather is concerned primarily with management-related data, the burden falls upon the union to demonstrate that the subject matter of its request bears a special relationship to a mandatory subject of collective bargaining.⁴⁴

The subjects of collective bargaining generally fall within one of three classes: mandatory, permissive, and illegal.⁴⁵ Mandatory subjects of collective bargaining are those upon which the parties must negotiate in good faith, although it is not necessary that the parties reach an agreement.⁴⁶ In *NLRB v. Wooster Division of Borg Warner Corp.*,⁴⁷ the Supreme Court, relying in part on sections 8(d) and 9(a) of the NLRA, held that the mandatory obligation of an employer and union to bargain collectively extends only to wages, hours, and other terms and conditions of employment.⁴⁸ It is these mandatory bargaining subjects to which the employer's duty to disclose relates.

Matters that fall outside the scope of "wages, hours, and other terms and conditions of employment" but upon which the parties nevertheless may bargain are the permissive subjects of collective bargaining.⁴⁹ These permissive subjects generally relate to the areas traditionally within the control of either management or union: the so-called management prerogatives and union prerogatives.⁵⁰ On these subjects, the parties can agree to bargain or not, but a refusal to bargain by either party will not constitute an unfair labor practice.⁵¹ Perhaps the most instructive

43. E. BAKKE, *MUTUAL SURVIVAL* 80 (2d ed. 1966) [hereinafter cited as BAKKE].

44. See text accompanying notes 13-16 *supra*.

45. See generally R. GORMAN, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 496-531 (1976) [hereinafter cited as GORMAN].

46. *Id.* at 496.

47. 356 U.S. 342 (1958).

48. *Id.* at 348-49.

49. *Id.* at 349.

50. GORMAN, *supra* note 45, at 523.

51. *NLRB v. Wooster Div. of Borg Warner Corp.*, 356 U.S. 342, 349 (1958).

definition of the management prerogatives aspect of permissive collective bargaining subjects is found in Justice Stewart's concurrence in *Fibreboard Paper Products Corp. v. NLRB*,⁵² in which the Justice stated that management prerogatives are those

managerial decisions which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital, and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of § 8(d), is to describe a limited area subject to the duty of collective bargaining, those managerial decisions which are fundamental to the basic direction of corporate enterprise or which impinge only indirectly upon employment should be excluded from that area.⁵³

With the duty to disclose limited by the less than bright line formula of relevance to a mandatory subject of collective bargaining, and with the relationship of the parties fixed in an antagonistic posture, an expansion of the reach of relevancy may turn upon the ingenuity or lack thereof of the parties. A creative union may be able to articulate its request for information in a manner by which the request conforms to a mandatory subject of collective bargaining, even though the subject matter of the request relates in fact to a permissive subject. This technique was utilized effectively in *Sylvania Electric Products, Inc. v. NLRB*⁵⁴ to compel an employer to disclose information about the cost of employee welfare programs, despite the fact that the employer was not required to bargain with the union over whether the employer was receiving the best coverage for its money.⁵⁵ In *Sylvania Electric Products*, the union had couched its requests in terms of its need to weigh the value to the employees of an increase in welfare benefits against an increase in take-home pay.⁵⁶ Although it can be argued that the *Sylvania Electric Products* holding that the employer must comply with the union's request for information extends the disclosure duty to permissive subjects of collective bargaining, the court in *Western Massachusetts Electric Co. v. NLRB*⁵⁷ indicated that the *Sylvania Electric Products* rationale would be limited to situations in which there is a close nexus between the union's information request and a mandatory subject: "Just as a union cannot compel an employer to bargain over subjects that fall outside the ambit of 'wages, hours and other terms and conditions of employment' it cannot bootstrap a demand for information relating to nonmandatory matters by its unilateral assertion of interest."⁵⁸

52. 379 U.S. 203 (1964).

53. *Id.* at 223 (Stewart, J., concurring).

54. 358 F.2d 591 (1st Cir.), *cert. denied*, 385 U.S. 852 (1966).

55. *Id.* at 593.

56. *Id.*

57. 573 F.2d 101 (1st Cir. 1978).

58. *Id.* at 110.

The issues of subcontracting and non-unit employees are particularly fertile fields of inquiry for unions, and clearly evidence the linedrawing in which the NLRB and the courts engage when acting on union information requests, linedrawing that often appears to occur without consideration of the underlying justifications for the requests. An employer generally need not disclose subcontracting information to the union if the employer's subcontracts do not divert work previously done by members of the bargaining unit.⁵⁹ The justification for this rule is twofold: first, depending upon the facts of the particular circumstance, subcontracting by the employer may not be an issue about which the employer is required by section 8(a)(5) to bargain with the union;⁶⁰ second, the Board consistently has held that a union may waive its right to any and all information on subcontracting by agreeing to a management prerogatives clause in the collective bargaining agreement between the parties.⁶¹ The second rationale—waiver through a management prerogatives clause—is susceptible to criticism. By agreeing to a management prerogatives clause, all that the union has waived is the right to bargain about the subjects embraced by management prerogatives, not the right to consider relevant information in evaluation of its own position. The Board has not considered whether the union could use this information to promote its own internal efficiency in the interest of worker security, while still affording management the benefit of its bargain. Without access to subcontracting information, a union may not be able to assess whether it is pressing management too hard in light of the services that outsiders are profitably offering to management.

Information regarding non-unit employees is placed in a similar category, in that, absent a showing by the union of erosion of the bargaining unit because of non-unit workers, the information will be deemed irrelevant.⁶² cursory treatment also is given to requests for the books and records of subsidiary or related corporations. Unless the union is capable of demonstrating relevance to a mandatory subject of bargaining, the requests will be denied with minimal inquiry into whether the subsidiaries are being utilized as devices to siphon off funds or work of the corporation with which the union is dealing, in an effort to defeat union demands.⁶³

Given the acceptance of the antagonistic model of the collective bargaining relationship, one would expect unions to have engaged in a struggle with management over their right to access to this information. In

59. *Id.* at 106; Fifty Div. Hayes-Albion Corp., 190 N.L.R.B. 146, 147 (1971).

60. Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 209 (1964).

61. Hughes Tool Co., 100 N.L.R.B. 208, 209 (1952).

62. See cases cited in note 16 *supra*.

63. Adams Insulation Co., 219 N.L.R.B. 211, 214 (1975). *Cf.* Teleprompter Corp. v. NLRB, 570 F.2d 4, 10 (1st Cir. 1977) (limited financial data of the subsidiary became relevant upon parent's assertion of inability to pay).

relation to union efforts to secure wage and wage-related data, however, the case law on disclosure of management-related information surprisingly has been relatively meager. When the issue has been raised, the Board and the courts have couched their denials of union requests in terms of the union's failure to show relevance to a mandatory subject of collective bargaining.⁶⁴ While union requests for wage and wage-related data summarily are granted "in order to effectuate intelligent and efficacious bargaining" by the union,⁶⁵ requests for management-related information generally are denied on the opposite ground; namely, that such data is not necessary for intelligent bargaining.⁶⁶ As a result, one is left free to speculate on what is meant, at least by the Board and the courts, by "intelligent bargaining." Their language lacks a supporting rationale. A possible explanation for this absence of reasoning may lie in the Board's tendency to affirm without opinion the rulings of administrative law judges, thereby avoiding any necessity to explain these rulings. The results of enforcement proceedings in the courts of appeals unfortunately shed no additional light on the problem. The courts ascribe special expertise to the NLRB, and engage in little independent analysis of these issues. Moreover, the courts increasingly are becoming receptive to the defense of confidentiality, which has precluded, for example, union access to information such as operating and marketing programs,⁶⁷ and executive salaries and detailed reports of operating expenses.⁶⁸

Although this Article has criticized the paucity of reasoning offered by the Board and the courts for the disclosure rules, it must be recognized that unions may be equally at fault. Unions have failed to exert sufficient pressure on management to provide management-related information. It may be that, in recognizing the need for distinct areas in which management can make those quick judgments necessary for efficient and successful operation of the business, unions have confused the need to bargain with the need to know.

3. *Practical Effects*

By framing the issue in terms of relevance to a mandatory subject of collective bargaining, and by casting it in the light of principles of labor-management confrontation, the Board and the courts have avoided any analysis that might reflect an appreciation for potential union uses of management-related information. The currently prevailing view appears to be that the sole use to which unions would apply such data would be an

64. *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1964).

65. See cases cited in notes 14 & 15 *supra*.

66. *Teleprompter Corp. v. NLRB*, 570 F.2d 4, 8-9 (1st Cir. 1977), *United Furniture Workers v. NLRB*, 388 F.2d 880, 883 (4th Cir. 1967); *International Woodworkers v. NLRB*, 263 F.2d 483, 485 (D.C. Cir. 1959); *General Aniline & Film Corp.*, 124 N.L.R.B. 1217 (1959).

67. *Kroger Co. v. NLRB*, 399 F.2d 455, 457 (6th Cir. 1968).

68. *Metlox Mfg. Co. v. NLRB*, 378 F.2d 728, 729 (9th Cir. 1967).

attempt to wrest control from management. This perspective, however, may prove too narrow. Rather than result in further confrontation between labor and management, union access to and use of management-related data may be a substantial step towards cooperation between the parties.

Cooperation can be gained, however, through the consent of the contracting parties.⁶⁹ Concessions made by management in the form of information provided to foster the contractual relationship need not have the effect of involving the union in the day-to-day functioning of the enterprise. Rather, the information would enable the union, based on an informed and realistic appraisal of the situation, to bargain for the most suitable allocations of management's available resources.

The idea has been advanced that if unions would view worker efficiency as a means of increasing the firm's earning power, and hence its ability to pay increased wages, the union would be willing to offer increased worker efficiency as part of the bargain.⁷⁰ This willingness derives from an understanding of the employer's fiscal situation, which puts the union in a position in which it will be unable to ignore the problems of a struggling company without inflicting the consequences on its rank-and-file.⁷¹ The union is not seeking access to the "property" of the company, but rather is seeking data to obtain security for its workers and perhaps, ultimately, for the plant itself.⁷² This result is possible in a cooperative setting, in which management supplies information about productivity, efficiency, and techniques despite the categorization of this subject matter as management prerogatives.⁷³ This result would be of significant mutual benefit and, as will be explored subsequently, should be unfettered by the present requirement of relevance.

There is evidence that cooperation yields results. Chief Executive of American Can Company and Chairman of the National Association of Manufacturers Industrial Relations Committee, William F. May, made the following observation of his situation:

Open exchanges of information through clear channels of communication are basic. I recall several situations where my company was faced with uneconomical costs at some of its plants, and where we discussed the circumstances with both the local and the international union representatives. After we had carefully explained all the facts, we had two types of

69. N. CHAMBERLAIN & J. KUHN, *COLLECTIVE BARGAINING* 89-90 (2d ed. 1965) [hereinafter cited as CHAMBERLAIN & KUHN].

70. *Id.* at 369-70.

71. See text following note 94 *infra*.

72. *Id.*

73. In *General Aniline & Film Corp.*, 124 N.L.R.B. 1217 (1959), just this type of information was denied to the union as it was used by management only to schedule work, and had no bearing on wage rates. Likewise in *Kroger Co. v. NLRB*, 399 F.2d 455 (6th Cir. 1968), no refusal to bargain was found as to an employer's refusal to turn over a report dealing with the scheduling of employee hours, as the report was said to contain information about unique manufacturing processes utilized by the company in production, and refusal was necessary to protect management's property rights.

experiences. One where the union not only accepted the facts but agreed to action to correct the situation; others where the union would take no action. In the first instance, the plants have continued to progress and grow, while in the latter case the plants have been closed. While agreements for wage cuts or freezes are relatively uncommon, they demonstrate an awareness that objectives other than the pursuit of "more" are in the nation's interest.⁷⁴

Union-management cooperation in the area of cost and efficiency, although not widespread, has been undertaken on a limited scale. The Scanlon Plan was developed by union representative Joseph Scanlan in 1937 to reduce the costs of operating the employer's steel mill.⁷⁵ The philosophy of the plan is that efficiency depends on effective cooperation through teamwork to reduce costs.⁷⁶ The plan presupposes mutual confidence of labor and management. All supervisory and rank-and-file employees are included and share in whatever bonus is earned by reference to a prearranged formula.⁷⁷ Monthly meetings are held at which union representatives are given essential facts about the condition of the company and the nature of the competition that it faces.⁷⁸ Although introduction of the plan has had varied success in different plants, one standard result has been the encouragement of employees to take a broader and more balanced view of their own interests.⁷⁹ Contract negotiations have been more realistic and informed, and both sides have found that this facilitates reaching an agreement.⁸⁰

A more recent example of cooperation yielding benefits for both management and labor arose out of the financial crisis that struck one of the "big three" automobile manufacturers, Chrysler Corporation. Traditionally, the United Auto Workers engage in pattern bargaining; that is, the contract negotiated with one of the three major manufacturer sets a standard for the entire industry. All three manufacturers face the threat of a strike until shortly before the existing contracts expire. The union then chooses a target company that will be pressed for a settlement.⁸¹ The bargaining in 1979 deviated from this scheme because of Chrysler's precarious financial situation. When the Carter Administration predicted a federal financial aid package for Chrysler on concessions by the Auto Workers,⁸² the union exhibited the cooperation necessary to save both the company and the jobs of its members. At the outset, the union ruled out Chrysler as a strike target because of the ailing automaker's inability to

74. M. RUKEYSER, *COLLECTIVE BARGAINING: THE POWER TO DESTROY* 106-07 (1968).

75. S. SLICHTER, J. HEALY & E. LIVERNASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* 864-65 (1960).

76. *Id.* at 865.

77. *Id.*

78. *Id.* at 868.

79. *Id.*

80. *Id.*

81. *Wall St. J.*, July 19, 1979 at 4, col. 2.

82. *Id.*, Oct. 16, 1979 at 6, col. 1.

withstand such a blow.⁸³ More dramatically, the terms of the negotiated contract represented a break from those reached with Ford and General Motors. Although the new contract provided for the annual wage increases of three percent agreed to by Ford and General Motors, Chrysler was permitted to delay the increase for six months in the first year of the contract, four months in the second year, and two months in the third.⁸⁴ At that time, Chrysler employees were to reach parity with the rest of the industry. Similarly, while the cost of living provisions met the industry standard, Chrysler was permitted to delay implementation until December 1980, folding the cost of living allowance accumulated during the old contract into the year-end paychecks of each employee.⁸⁵ This accumulation normally is figured into the base pay of the new contract at the start of the agreement.

It is clear from the foregoing examples that the management of a financially troubled enterprise can only gain by disclosing information to the unions with which it is trying to bargain. Apprised of impending disaster, unions tend to work with management to save the business, and to save jobs for the employees they represent.

This Article rests upon the fact that cooperation between labor and the management of more successful enterprises could also be enhanced by disclosure of additional information to unions. Rather than trusting management to resist excessive demands, the union would have the information necessary to determine for itself whether the wages for which it is pressing would endanger the health of the enterprise and whether an increase in efficiency could be exchanged for higher pay. The union could cooperate with management to build a strong enterprise that would benefit both worker and stockholder alike.

Unions are not the only force that seeks information from management. Commercial and investment bankers, insurance companies, and suppliers all exert financial pressure on management to disclose details about the company. The most pervasive rights to information, however, are exercised by government. Corporations falling within the scope of the Securities Exchange Act⁸⁶ are responsible for supplying the government with great masses of information, including methods of accounting, assets and liabilities, and remuneration of directors.⁸⁷ The Securities and Exchange Commission further regulates the contents of proxy statements supplied to shareholders. It is not particularly relevant that unions can gain access to this information simply by purchasing a share of stock. What is important is that, in some contexts, management can be forced to comply with clear invasions on what it asserts to be its

83. *Id.*, July 19, 1979 at 4, col. 2.

84. N.Y. Times, Oct. 26, 1979 § A at 1, col. 4, § D at 6, col. 3.

85. *Id.* § D at 6, col. 4.

86. 15 U.S.C. §§ 77, 78 (1976).

87. *See, e.g.*, 15 U.S.C. § 78(g) (1976).

property rights. Disclosure of information not now deemed "relevant" to the bargaining process thus would present no greater burden than management already bears.

The following not very far fetched hypothetical illustrates the dysfunctionality of the current, inadequate disclosure requirements. In December 1978, the Retail Clerks Union negotiated a new collective bargaining agreement with Food Fair Company. Accurate reports that Food Fair had entered into receivership had not yet been circulated, and only management was aware of the company's precarious situation. Food Fair never asserted an inability to pay claim during negotiations, and the clerks were able to bargain for an approximately twelve percent wage increase effective on or about February 1, 1979. The question is whether the union, if informed of management's long-range plans for the enterprise, would have pushed for such an increase or would have sought a contract that provided for job security or a severance pay clause.

The Food Fair hypothetical exemplifies the obvious: a union cannot play the game without knowing the rules. In this case, in which the rules consist of the data that could enable the union to determine where to draw the line on their demands, knowing the rules makes for fair play.

The hypothetical reinvoles the questions as to the scope of relevance and mandatory subjects of bargaining which opened this section. Although the decision to close a plant for economic reasons is not a mandatory subject of bargaining,⁸⁸ the Board and courts should be willing to accept the argument that given the duty to bargain over a severance pay clause, the long-range prospects of the company are relevant and necessary to decide whether presently to bargain for severance pay or to seek an immediate wage increase. Moreover, the union needs to know about ultimate plans for plant expansion or contraction because such plans are relevant to bargaining about seniority.

The very existence of these types of questions and the conceivable variance in answers that could result depending upon whether one plugs them into the cooperative or the antagonistic model of labor relations illustrates the imperfect attempt to define the duty to disclose in terms of bargainable subjects and live grievances. If collective bargaining is to be seen as a purely antagonistic relationship, then a restrictive approach to the standard of relevance, by which a union is forced to establish a close nexus between its request for information and a bargainable subject, will have the effect of continuing the distrust and fear of incursion into the affairs of the other side. Yet if antagonism is the desired goal, a relevance standard may be necessary to permit the system to perpetuate itself. It would appear that once a union is allowed to reflect upon its relationship with management from a holistic perspective, some notions of cooperation may filter into the system. One could imagine a purely cooperative system

88. *Textile Workers v. Darlington Co.*, 380 U.S. 263 (1964).

in which the union's interest in the enterprise is no longer wholly self-serving, but rather is cast in terms of formulating its demands to secure the most propitious combination of benefits for its members and advantages to the enterprise. In that situation the standard of relevance would be devoid of significance since "relevance" would encompass virtually all information that the union might seek or that management might offer to attain that end. It is the author's contention that, by expanding the concept of relevance to support these more attenuated requests for information, the system could absorb the subtle interjection of elements of cooperation on an almost experimental basis, thereby allowing the parties, without having to face an articulate choice, to reflect upon their ability and willingness to move towards a cooperative system of labor-management relations on a full-scale basis.

III. ALTERNATIVES FOR REGULATING DISCLOSURE

Having determined that disclosure of information can be a valuable step towards promoting union-management cooperation, alternative means for promoting this goal must be considered. The balance of this Article will explore the potential for regulating disclosure in order to reconcile the statutory framework of the National Labor Relations Act, which serves as the bulwark for the collective bargaining relationship.

A. *European Models*

A useful starting point is to examine how this problem has been dealt with elsewhere. The focus of this section will be three European statutes that impose explicit disclosure requirements on employers.

1. *Great Britain*

The Employment Protection Act of 1975, supplemented by the British Code of Practice on Disclosure of Information to Trade Unions for Collective Bargaining Purposes,⁸⁹ is the regulatory force at work in Great Britain. The Act imposes on the employer a duty to disclose to the recognized union all information without which the union would be materially impeded in carrying on collective bargaining⁹⁰ "in accordance with good industrial relations practice."⁹¹ Guidance on the meaning of "good industrial relations practice" is provided by the Code of Practice.⁹²

The Code gives examples of relevant information that should be disclosed. The examples may be broadly described as falling within the areas of pay and benefits, conditions of service, manpower, performance,

89. Advisory, Conciliation, & Arbitration Service, Code of Practice 2 (1977) [hereinafter cited as Code of Practice].

90. Employment Protection Act, 1975, c. 71, § 17(1)(a).

91. *Id.* at § 17(1)(b).

92. Section 17(4) of the Act contemplates the creation of the Code.

and finances,⁹³ and go well beyond those deemed "presumptively relevant" by the NLRB.⁹⁴ Included is much of the information that the author believes is necessary for the harmonious development of American labor relations.

The British employer's obligation to disclose continues throughout the collective bargaining process;⁹⁵ a request may be presented to the employer before, during, and after the agreement is reached and regardless whether a contract is in force at that time.⁹⁶ Since trade unions in Great Britain must be recognized by an employer in order to bargain about each matter,⁹⁷ the scope of information that is available to the union is coterminous with that recognition.⁹⁸ the union can apply for expanded recognition,⁹⁹ and, if the application is approved, the duty to disclose expands commensurately.¹⁰⁰

Disclosure, however, is subject to several broad defenses, which potentially can swallow up the duty and defeat the purpose of the Act. Specifically, an employer may withhold:

- (a) any information the disclosure of which would be against the interests of national security, or
- (b) any information which he could not disclose without contravening a prohibition imposed by or under an enactment, or
- (c) any information which has been communicated to the employer in confidence, or which the employer has otherwise obtained in consequence of the confidence reposed in him by another person, or
- (d) any information relating specifically to an individual, unless he has consented to its being disclosed, or
- (e) any information the disclosure of which would cause substantial injury to the employer's undertaking for reasons other than its effect on collective bargaining, or
- (f) any information obtained by the employer for the purpose of bringing, prosecuting or defending any legal proceedings. . . .¹⁰¹

Finally, the employer has what amounts to a defense of undue burden—it need not directly produce or copy any documents other than those prepared to convey the information, or compute any such data if the cost or work required is out of proportion to the data's value for collective bargaining purposes.¹⁰²

93. Code of Practice, *supra* note 89, ¶ 11.

94. See notes 12-16 *supra* and accompanying text.

95. Employment Protection Act, 1975, c. 71, § 17(1).

96. See Note, *The Employment Protection Act 1975—Collective Aspects*, 39 MOD. L. REV. 169, 178 (1976).

97. Employment Protection Act, 1975, c. 71, § 12.

98. *Id.* at § 17(2)(a), (b).

99. *Id.* at § 12.

100. *Id.*

101. *Id.* at § 18(1).

102. *Id.* at § 18(2).

2. *West Germany*

In West Germany, the major role in collective employee representation at the plant level is assigned to an institution that is legally distinct from, but in practice closely allied with, the labor unions—the *Betriebsrat* or works council.¹⁰³ West German law requires the employer to furnish the works council with information necessary to discharge its duty.¹⁰⁴ For example, because the works council is required to accept employee complaints and to attempt to remedy them with the employer,¹⁰⁵ it must be informed of the employer's actions in handling the complaint.¹⁰⁶ The works council is also entitled to receive written records of accident investigations and of inspections and discussions relating to work safety and accident prevention,¹⁰⁷ in which the council is also required to take part.¹⁰⁸

In addition, the employer must inform the works council about planning of changes in working areas, procedures, and routines, in technical facilities, or in jobs.¹⁰⁹ The council must also be given comprehensive data on personnel planning,¹¹⁰ including data on both current and future personnel demands.¹¹¹

German law also provides for the establishment of a *Wirtschaftsausschuss*, or economic committee, in companies with more than one hundred employees.¹¹² The committee must consult with the employer on financial matters and report its results to the works council.¹¹³ In this

103. SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, *LABOR RELATIONS AND THE LAW IN WEST GERMANY AND THE UNITED STATES* 92 (Mich. International Labor Studies Vol. III 1969).

104. The general duties of the works council as defined by statute are:

1. to see that effect is given to Acts, ordinances, safety regulations, collective agreements, and work agreements for the benefit of employees;
2. to make recommendations to the employer for action benefitting the establishment and the staff;
3. to receive suggestions from employees and the youth delegation and, if they are found to be justified, to negotiate with the employer for their implementation; it shall inform the employers concerned of the state of the negotiations and their results;
4. to promote the rehabilitation of disabled persons and other persons in particular need of assistance;
5. to prepare and organize the election of a youth delegation and to collaborate closely with the said delegation in promoting the interests of the young employees; it may invite the youth delegation to make suggestions and to state its views on various matters;
6. to promote the employment of elderly workers in the establishment;
7. to promote the integration of foreign workers in the establishment and to further understanding between them and their German colleagues.

Law of Jan. 15, 1972 [1972] BGBI I 13 (W. Ger.) § 80(1).

105. *Id.* at § 85(1).

106. *Id.* at § 85(3).

107. *Id.* at § 89(4).

108. *Id.* at § 89(2), (3).

109. *Id.* at § 90.

110. *Id.* at § 92(1).

111. *Id.*

112. *Id.* at § 106(1).

113. *Id.*

connection, the employer must timely furnish the economic committee detailed information about the company, including information on the company's economic and financial situation; its production, sales, and investments; new working methods; a reduction in operations, shutdown, relocation, or merger of the company; and any other circumstances that may materially affect the employees' interest.¹¹⁴ This duty to disclose, however, applies only if it does not endanger the company's technological and business secrets.¹¹⁵

3. *Belgium*

The Belgian statute¹¹⁶ goes furthest in requiring disclosure to workers' representatives. In Belgium, the enterprise council (*conseil d'entreprise*),¹¹⁷ composed of representatives of both management and labor,¹¹⁸ must be informed of a complete range of information relating to the enterprise. Members of the council, which operates as a deliberative and cooperative body of codetermination to review and establish policies relating to the employees and their welfare,¹¹⁹ must be given data such as the company's current market position, its financial structure, personnel expenses, budget, the calculation of the cost of production, and prospects for the company's future.¹²⁰ The enterprise council, subject to agreement by all parties, may summon the use of experts for investigation or clarification of technical points.¹²¹ The basic data must be made available within two months after the members are elected to the enterprise council,¹²² with annual reports supplied within three months following the closing date, but prior to the shareholders' meeting, with supporting documents in the nature of updates to the basic information and financial statements supplied fifteen days prior to the meeting of the enterprise council.¹²³ Finally, the employer must provide quarterly reports¹²⁴ and independently inform the council of any external events or internal decisions of

114. *Id.* at § 106(3).

115. *Id.* at § 106(2).

116. Decree of Nov. 27, 1973, relative to the communication of financial information to the enterprise council [1975] 3 LES CODES LARCIER 310 [hereinafter cited as Decree of Nov. 27, 1973]. See also Smith, *Disclosure of Information: Can Britain Learn from Belgium*, PERSONNEL MANAGEMENT 20 (July 1977).

117. The board, here styled "enterprise council," is similar to the works council in Germany. For the sake of clarity, the Belgian board will be called by a different name. "A[n] [enterprise] council consists of at least two . . . employee representatives, an equal number of alternate or substitute representatives, the employer, and one or more of his representatives and their alternates." J.-P. DE BANDT, CCH BUSINESS GUIDE TO BELGIUM ¶ 807 (1978) [hereinafter cited as DE BANDT].

118. Decree of Nov. 27, 1973, ch. 1, art. 3.

119. DE BANDT, *supra* note 117, at ¶ 807.

120. Decree of Nov. 27, 1973, ch. 2, art. 4.

121. *Id.* at ch. 9, art. 34.

122. *Id.* at ch. 2, art. 4.

123. *Id.* at ch. 3, art. 16-17.

124. *Id.* at ch. 4, art. 24.

consequence to the enterprise.¹²⁵ The German Works Constitution Act, while similarly operative without any triggering by the union, merely requires that the representatives be informed within a "reasonable" time.¹²⁶

4. *Comparisons*

Despite the variations among these three statutes, a bare reading¹²⁷ of their language reveals several important distinctions that set them apart from American labor law. Although differences in worker welfare organizational structure distinguish England's statute from the two continental nations, all three countries have articulated the need to inform the workers' representatives of a broad range of company activities. In contrast to the American practice of forcing the union to prove relevance to a mandatory subject of bargaining, disclosure in the European nations is an affirmative duty, with the burden on the employer to justify any avoidance of its obligation.

Part of the reason European employers acquiesce in the broad regulation of disclosure is their implicit acceptance of the legitimacy of the collective structure. The parties deal with each other in a relationship premised on notions of shared responsibility and the right of workers to a voice in the enterprise, whether expressed through collective bargaining, as in Britain, or through organs of codetermination, as in Germany and Belgium. Given a recognition of this mutuality, it is less intrusive for the legislature to regulate it; the spirit of cooperation at once prompts and supports the broad disclosure rules, which in turn strengthen cooperation.

This spirit has not developed in American labor relations, and acceptance of the collective structure has not, thus far, been enthusiastic. The transition of labor unions from "criminal conspiracies"¹²⁸ to chosen representatives of employees has been a troubled one.¹²⁹ The Wagner Act, for example, reflected the need to protect the right to organize; at the same time, however, the range of potential problems relating to collective bargaining was recognized and the National Labor Relations Board was created to encourage collective bargaining and to promote industrial peace under the broad contours of the statute.¹³⁰ The legislation, as interpreted by the NLRB, serves as the underpinning for an uneasy industrial peace. It does not, however, infuse American labor-management relations with a spirit of cooperation.

125. *Id.* at ch. 5, art. 25.

126. Law of Jan. 15, 1972 [1972] BGB I § 13 (W. Ger.) §§ 90, 106.

127. That is to say, without regard to how they work in practice. Thus, the author does not consider problems of enforcement, as, for example, that of the Belgian statute, which was reportedly not being complied with by half the employers three years after enactment. Smith, *supra* note 116, at 23.

128. 3 J. COMMONS & E. GILMORE, A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59-248 (1910).

129. GORMAN, *supra* note 45, at 3-5.

130. See 29 U.S.C. § 151 (1976).

B. *American Alternatives*

An obvious alternative to the present American system of labor-management relations would be congressional action modeled after the European statutes previously discussed. Legislation, however, is a slow process whose end product tends to be a vague and ambiguous reflection of the compromises reached by countervailing political forces. This observation is particularly relevant to disclosure, which is a matter of low congressional priority. Unions have not pushed hard to gain access to additional information. Therefore, the likelihood that the legislature would act with any speed or clarity is optimistic. In a situation in which the parties feel less than a total commitment to the collective structure as such, the time spent by both sides trying to evade vague requirements would strip the legislative efforts of their vitality. An alternative to legislation, and the only realistic approach under the circumstances, is to look to the NLRB, which was a conscious effort by Congress to deal with Labor relations, to provide regulatory leadership within the scope of its congressionally delegated authority.¹³¹ In the past the Board has regulated disclosure by *ad hoc* determinations in unfair labor practice proceedings.¹³² This method has been a failure. The Board has managed to avoid looking at the problem in its totality, and the principles that the Board has developed lack the coherence necessary to guide not only the conduct of unions and management, but that of lower echelon members of its own staff.¹³³ This is particularly true when the issue of disclosure is but one small part of a broad unfair labor practice proceeding. In addition, the Board's tendency to affirm or reverse summarily the administrative law judge offers an opportunity for management to evade disclosure by avoiding any reference to its inability to pay, or by merely asserting the lack of relevance of the information requested. The creative union, on the other hand, will structure its demands to create some relationship, no matter how attenuated, to a mandatory subject of bargaining. These possibilities for manipulation and obfuscation preclude the development of consistent regulatory policy, a prime rationale espoused during the New Deal era for the development of administrative agencies such as the NLRB.¹³⁴

Moreover, the Board's own procedures prevent it from seeing the problem as a whole. The General Counsel initially must, based on an

131. Although many such broad delegations have been questioned as unconstitutional, *see, e.g.*, *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974), *Kent v. Dulles*, 357 U.S. 116 (1958), the question may turn on whether the particular legislative power is one which the framers of the Constitution intended for Congress alone to exercise. J. FREEDMAN, *CRISIS & LEGITIMACY* 86-88 (1978). It seems unwieldy to construe the commerce clause, the constitutional basis of the National Labor Relations Act, as embodying a uniquely congressional power that would force Congress itself to face and resolve all problems of industrial relations.

132. *See, e.g.*, cases cited in note 11 *supra*.

133. Only about 4% of all unfair labor practice charges actually reach the Board. The balance are resolved at an earlier stage. GORMAN, *supra* note 45, at 9.

134. JAFFE & NATHANSON, *ADMINISTRATIVE LAW: CASES & MATERIALS* 168 (4th ed. 1976).

investigation of the facts and the parties before him, decide whether to issue a complaint.¹³⁵ If the union believes it has no right to the information, it is likely to avoid the cost in time and money of going before the General Counsel in the first place, and the Board will never be given the opportunity to adjudicate that particular disclosure question. Even when the union does come forward with a meritorious charge, the General Counsel may prefer to wait for a better set of facts before litigating the question.¹³⁶ Finally, the often cryptic nature of the opinions issued when an unfair labor practice is litigated fails to provide the General Counsel with a clear guide for his decision whether to institute suit.¹³⁷ A decision not to issue a complaint, even when it is based on a mistaken interpretation of the Board's opinion, precludes any review of the issue.

Adjudication, however, is not the only way in which the Board can proceed. Section 6 of the National Labor Relations Act empowers the Board "from time to time to make, amend and rescind in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of the Act."¹³⁸ Since its inception, the Board has exhibited a disinclination toward this procedure, despite much criticism for viewing itself solely as a quasi-judicial body¹³⁹ and despite the advantage that rulemaking provides in the pursuit of cogent and consistent policy. It is unclear whether the Board could do better by rulemaking than it has by adjudication. It is submitted, however, that, given the observed failure of adjudication, the only way in which a cogent policy of disclosure can be developed is for the Board to engage in rulemaking pursuant to the requirements of section 4 of the Administrative Procedure Act.

It has been over thirty years since the Board first addressed the issue of disclosure. The Board, however, has never promulgated rules applicable either to disclosure in particular, or to labor-management relations in general.¹⁴⁰ Nevertheless, rulemaking encourages the Board to view the issues in a broader context, to go outside the confines of a record, and to consult with anyone who is in a position to offer guidance.¹⁴¹

As a procedural matter, the Board must publish notice of its intent to engage in rulemaking, and must give all interested persons an opportunity to participate by written submissions or oral presentations, at the Board's

135. National Labor Relations Act §§ 3(d), 10(b), (d), 29 U.S.C. §§ 153(d), 160(b), (d) (1976).

136. See Silverberg, *Informal Procedures of the National Labor Relations Board*, 6 SYRACUSE L. REV. 72 (1954).

137. See Bernstein, *The NLRB Adjudication-Rulemaking Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 576 (1970) [hereinafter cited as Bernstein].

138. National Labor Relations Act § 6, 29 U.S.C. § 156 (1976).

139. See K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 6.03 (3d ed. 1972) [hereinafter cited as DAVIS].

140. Baker, *Policy By Rule or Ad Hoc Approach, Which Should it Be?* 22 LAW & CONTEMP. PROB. 658 (1957).

141. Bernstein, *supra* note 137, at 589-93.

option.¹⁴² The Board within thirty days must publish a proposed rule.¹⁴³ After the proposed rule is formulated, the Board can request further comment and repeat the above procedure.¹⁴⁴

Any disclosure rule that thus is formulated need not be inflexible. It should, however, be structured with sufficient specificity to offer labor and management the assurance of predictability and uniformity of treatment while also leaving open the opportunity to formulate exceptions in light of the parties' real need for information, their ability and trustworthiness concerning its ultimate use, and whether the information is so sensitive and confidential that disclosure will constitute a threat to the enterprise.¹⁴⁵ Unlike the effect of *stare decisis* on adjudication, section 6 of the National Labor Relations Act empowers the Board to repeal the rule if, upon reevaluation, it is found to be ineffective.¹⁴⁶

A correlative advantage of rulemaking that stems from the promotion of uniformity and predictability is its ability to decrease litigation. The parties have access to the rule published in the Federal Register,¹⁴⁷ and no longer need to guess about where they fit into the ever-changing body of case law.¹⁴⁸ This increased clarity is at the same time apparent to the Regional Counsel's office, which can encourage informal settlement, thereby saving time and money while reducing ill feelings between the parties. If a dispute arises during the course of bargaining, the union could request a decision of the Regional Counsel concerning its entitlement to the data prior to the filing of an unfair labor practice charge. Similarly, if an unfair labor practice charge is filed, the Regional Counsel's function would be to inform the parties of their rights and duties with respect to the requested information, and then either consent to the withdrawal of the charge if there is no violation, or urge the employer to provide the requested information to the union.¹⁴⁹

The final asserted benefit of rulemaking, that it avoids retroactivity,¹⁵⁰ does not clearly apply to the regulation of disclosure. Even the prospective application of a rule thirty days after its effective date¹⁵¹ will be retroactive in the sense that it might apply to documents prepared by the employer

142. Administrative Procedure Act § 4(b), (c), 5 U.S.C. § 553(b), (c) (1976).

143. *Id.* at § 553(d).

144. *Id.* at § 553(e).

145. The recent decision of the Supreme Court in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), held that the secrecy of aptitude tests and answers sought by the union must be protected against leakage. *Id.* at 315. No indication is given as to the potential scope of this holding.

146. 29 U.S.C. § 156 (1976).

147. Administrative Procedure Act § 4(b), 5 U.S.C. § 553(b) (1976).

148. See GORMAN, *supra* note 45, at 17 (Board announces new principles of law, and repudiates old ones, through adjudication).

149. Just as there is no private right to sue under the National Labor Relations Act, there is no private right to withdraw a charge, or settle one after it has been filed with the office of the Regional Counsel. See Silverberg, *supra* note 136, at 74.

150. See, e.g., Bernstein, *supra* note 137, at 598-602.

151. Administrative Procedure Act § 4(d), 5 U.S.C. § 553(d) (1976).

much earlier and without any knowledge that it would be required to supply them to the union. For example, a summary analysis of certain detailed inventory figures undertaken before the rule becomes effective might be the subject of a disclosure request. Such a neat summary, even if created for the convenience of the employer, may well be of much greater use to the union because of its ease of comprehension and succinctness. The future effect of the rule, or even official discussion of a rule, may be to curtail the amount of data that the employer will commit to paper in the future. The retroactivity of an administrative rule is, however, significantly less than the retroactive effect of adjudication. Rulemaking procedures give to an employer significant advance notice to evaluate the information in its possession, and to destroy that which it feels should be denied to the union. Furthermore, given the length of time necessary to promulgate a new rule, employers merely could cease to compile sensitive documents at the outset of the rulemaking process. By balancing the purported evils of retroactivity against the conduct that the statute seeks to prevent,¹⁵² the value of a rule promulgated pursuant to the Administrative Procedure Act, by which a discernible framework for this aspect of the duty to bargain in good faith could be set forth, outweighs the minimal retroactive burden on the employer.

C. *Proposed Rule*

The method of disclosure contemplated by this proposed exercise of rulemaking power should be triggered upon the request of a union for information, rather than through forced disclosure by management at various intervals. The Employment Protection Act of Great Britain, for example, becomes operative only upon the request of the union.¹⁵³ The statutes of Belgium and West Germany, on the other hand, contain mandatory language with no requirement that a request emanate from the workers.¹⁵⁴ Under Belgian law, the basic data must be made available within two months after the members are elected to the enterprise council,¹⁵⁵ with annual reports supplied within three months following the closing date, but prior to the shareholders' meeting, with supporting documents in the nature of updates to the basic information and financial statements supplied fifteen days prior to the meeting of the enterprise council.¹⁵⁶ Finally, the employer must provide quarterly reports¹⁵⁷ and must inform the council of any external events or internal decisions of consequential importance to the enterprise.¹⁵⁸ The German Works

152. See *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

153. Employment Protection Act, 1975, c. 71, § 17(1).

154. See Decree of Nov. 27, 1973, ch. 2, art. 4; Works Constitution Act § 106(2).

155. Decree of Nov. 27, 1973, ch. 2, art. 4.

156. *Id.* at ch. 3, arts. 16, 17.

157. *Id.* at ch. 4, art. 24.

158. *Id.* at ch. 5, art. 25.

Constitution Act, while similarly operative without any triggering by the union, merely requires that the representatives be informed within a reasonable time.¹⁵⁹

Conditioning the obligation to disclose on a union request is a realistic requirement. Many American unions are understaffed and such organizations would be unable to utilize effectively reams of data mandatorily disclosed. Moreover, the authority of the Board to formulate this rule stems from its power to regulate and define good faith bargaining. Absent the capacity of the union to use the data, or any articulated need or desire of the union to inspect it, it would appear that the Board would be forcing the parties into conduct that exceeds its power under section 6 of the National Labor Relations Act. Disclosure upon request, while maintaining the flexibility and predictability sought in a rule, permits the union to make a good faith determination of its need in light of its ability to make use of the data, thereby preserving the spirit of sections 8(a)(5) and 8(d).

Available at the request of the union should be all economic data regarding operation of the enterprise, including but not limited to the broad areas of: wage and wage related data, methods of financing the enterprise, production related data, market position, and any long range forecasts concerning the future of the enterprise. Once unions are capable of being apprised of changes in management's position, they should be capable of adjusting their grievances and demands to the realities of the situation.

The obligation to disclose relevant information must remain in force during the entire term of the collective bargaining agreement, irrespective of whether there is a grievance pending or a new collective bargaining agreement being negotiated. Intelligent performance of the union's function does not begin or end at any particular time and the Board must remain true to its philosophy that collective bargaining is really an ongoing process.¹⁶⁰ A properly drafted rule with predictable consequences will allow the parties to determine quickly their rights and to map out a strategy for the duration of the relationship. Moreover, to the extent that communications remain open throughout the duration of a collective agreement, the likelihood of industrial peace increases.

Notwithstanding the clear benefits of a more informal collective bargaining environment, management should not be required to disclose information if it is demonstrated that substantial harm to the enterprise would result from disclosure in a particular case or that the information requested by the union never existed. If, under the rule, management, since it is in command of the facts necessary to substantiate its defense, resists a legitimate request for information, then in a subsequent adjudicative

159. Works Constitution Act §§ 90, 106(2).

160. See GORMAN, *supra* note 45, at 455.

proceeding management would bear the burden of proving substantial harm based on the special circumstances.

D. Remedies

1. Violations by the Employer

Faced with a management refusal to disclose, the clearest course available to a union would be to file an unfair labor practice charge. While it was suggested above that automatic disclosure was untenable¹⁶¹ to provide unions with information in the first instance, an order requiring disclosure would be an appropriate remedy when an employer wrongfully refuses to comply with legitimate requests. Upon finding a violation, the Board would order the employer to turn over the requested information. Upon a finding of repeated violations, the Board might formulate some continuing mandatory scheme of disclosure similar to the Belgian model or it can tailor a remedy for the particular employer and union. The remedies envisaged by the statutes of West Germany and Belgium may prove unsatisfactory if applied in the context of American labor-management relations. The Works Constitution Act makes failure to comply with disclosure obligations a minor offense, punishable by a fine not exceeding DM 20,000 (the equivalent of approximately \$10,200 American).¹⁶² A violation of the Belgian Royal Decree can carry with it either a fine or a penal sanction.¹⁶³ A fine or penal sanction may be appropriate when the value of collective relations is already recognized and the effect of the remedy is to put teeth into the statutory requirements; the same punitive measures, however, would do little to promote the cooperation that is a goal of the rule in the first place. Fines steep enough to force future compliance by management would foster resentment and hostile compliance. Moreover, heavy penalties would subvert the goal of cooperation. The remedy logically should be consistent with the ultimate purpose of the rule.

The British sanction for nondisclosure entails a more intricate procedure, by which the trade union files a complaint with the Central Arbitration Committee (CAC),¹⁶⁴ which may refer the issue to the Advisory Conciliation and Arbitration Service (ACAS). If no settlement is reached, CAC determines whether the complaint is well founded, and if it is, issues a declaration accompanied by an explanation of its action. The employer is given a second chance to comply, and if he fails to do so, the trade union can bring a further complaint to CAC, which will once again make a determination and state its reasons for ordering disclosure (if that

161. See text accompanying notes 159-60 *supra*.

162. Works Constitution Act § 121.

163. Law of September 20, 1948 for the Organization of the Economy, Section V, 3 LES CODES LARCIER 299 (1975).

164. A judicial type board will hear issues if conciliation cannot be reached. See Employment Protection Act, 1975, c. 71, § 10.

is its decision). If CAC finds this further complaint to be valid, it can make an award ordering the employer to institute disclosure according to such terms and conditions as CAC deems appropriate.¹⁶⁵

Although section 10(c) of the NLRA gives broad remedial powers to the NLRB,¹⁶⁶ this authority must be viewed within the contours of the statute as a whole. Inasmuch as the duty to bargain in good faith does not require the parties to reach an agreement, it would be incongruous to allow the Board to impose an agreement upon the parties. Nevertheless, the Board could order the production of data or, in the event an employer will not or cannot comply with an order to disclose and if the disclosure issue pertains to a current bargaining problem, could force the parties to bargain to impasse on the disputed point. If the issue is not a "live" one, management could be required to meet with the union and ascertain the union's need for the information, substantiate the unavailability of any documents, and/or either supply the union with the missing information or reconstruct that which the union can prove was once in existence. While this remedy, although feasible, is fairly weak, the alternative, a unilateral order to disclose, would raise cries of protest from management.¹⁶⁷ Thus, given the Act as it now exists, disclosure and discussion are the practical, if not ideal, remedies.

2. *Obligation Upon the Union*

a. *Duty to the Employer*

To insure that the enterprise's competitive interests are protected, any rule promulgated should impose an obligation of confidentiality upon the union with respect to the information disclosed. If this obligation can be read into the union's duty to bargain in good faith, it ostensibly is subject to the Board's section 6 rulemaking power. In acquiring information, the union officials are placed in an altered position in relation to the company. When they are entrusted with this information in the interest of promoting intelligent bargaining and cooperation with an employer, they are at the same time made privy to the internal workings of the company.

The fine line between legitimate use of information by a union and exploitation, when good faith becomes an issue, is imminently clear in the situation in which a powerful union that represents employees in the plants of various employers within one industry. The possibility of the union requesting information from one employer and then using it as a device to obtain leverage in bargaining with another employer is not remote. Since such abuse by a union negates all justifications for broad disclosure, a union must be held to a standard of care with respect to its handling of disclosed information.

For example, Union X is the statutory collective bargaining

165. *Id.* at §§ 19, 20, 21.

166. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

167. See CULLEN AND GREENBAUM, *supra* note 37, at 1-3.

representative of the workers in Companies A, B, and C, who compete for the same market. Union X requests that the management of each company supply the union with long-range business forecasts. From these forecasts, the union learns that while Company A will be forced to close two of its plants within the next five years due to their continued unprofitability, Companies B and C are having no such difficulties. An unscrupulous Union X could at some point in the bargaining process inform Companies B and C of A's plight in order to push B and C to pay higher wages on the theory that they will be able to gather A's share of the market after A closes its plants. Union X clearly has used information entrusted to it by A to better its position with B and C, perhaps by inducing B and C to push A to an earlier grave. Although Union X may have attained benefits for its members who are employed by B and C, it has commensurately sacrificed the interests of the employees who it represents at Company A. By its actions, X has negated all the justifications for broad disclosure. To avoid this distasteful result and to maintain the integrity of the system, X should be held to liability not only for its possible antitrust violation¹⁶⁸ but also for breach of a standard of care.

The duty of confidentiality that would be imposed upon a union by the proposed rule is intended to temper the possibilities of such abuse. One line of reasoning upon which to draw in fashioning this duty is to view the union as holding the information as a type of fiduciary of the bargaining process and, in an attenuated manner, of the company itself. Since access to the information does not give to the union officials control over the business decisions of the company, the fiduciary analogy is imperfect. What it does illustrate, however, is that a union, by requesting information, is voluntarily assuming this added burden, which may place it in a potential conflict of interest and in danger of dissipating corporate assets. In its use of information obtained from management, a union therefore should be held to the standard of care that a prudent person would exercise in the management of his affairs. Such a negligence standard would render a union liable for any losses to the company that are proximately caused by the union's misuse of information. Damages could include the forfeiture of any gains for which the union was able to bargain as a result of its use of the information. Although a negligence remedy for misuse of information would be a private cause of action available to the injured employer, remedies might also be made available through the NLRB. Through such administrative remedies the Board could order the union to cease misuse of the information or to relinquish control over it, and possibly invoke sanctions against the officials involved in the misuse. Future requests for information by the offending union also could be

168. Some of the more egregious activities that might be undertaken by a union are probably within the ambit of antitrust legislation. *Cf. United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (union forfeits exemption from antitrust liability when it agrees with one set of employers to impose a certain wage scale on other bargaining units in a multi-employer unit).

subject to increased scrutiny because the employer in all likelihood would be able to show the potential for substantial harm by disclosure.

b. *Duty to the Union Membership*

When a union is performing its role as the statutory bargaining representative of the employees, the proposed disclosure rule would enable it to act with new and powerful insight. Any increased ability to obtain and use information in negotiating and administering a labor contract, however, must concomitantly carry with it an increased liability to the union membership to exercise the power fairly on their behalf.

That a union owes such a duty of fair representation to its members in negotiating and administering a collective bargaining agreement is unquestioned.¹⁶⁹ As first announced in *Steele v. Louisville Railroad*,¹⁷⁰ the duty of fair representation imposes upon the majority bargaining representative an obligation to fairly exercise the power conferred upon it by statute to protect the interests of all members of the bargaining unit without discrimination.¹⁷¹ The duty is not absolute, however; the Supreme Court has recognized that, because of the multitude of interests within the purview of a union's representative status, variations in the terms of a collective bargaining agreement must be permitted, even though resulting in disparate treatment, so long as the variations are based upon relevant differences.¹⁷² More recently, the Supreme Court's decision in *Vaca v. Sipes*¹⁷³ established that a breach of the duty of fair representation will be found only if the union's conduct is arbitrary, discriminatory, hostile, or in bad faith.¹⁷⁴

With the duty articulated, it is possible to conceive of two stages at which the union could incur liability in the context of the proposed broad disclosure requirements. It has been posited that an employer's obligation to disclose will extend only to such information as the union may request. The first level at which the duty might be imposed relates to the nature of the union's request. The union may totally abdicate its responsibility to its membership by failing to make any requests for information in the belief that its members will charge it with playing footsy with management. Alternatively, the union might tailor its requests to avoid confronting a particular issue that might prove troublesome in the context of bargaining or grievance adjustment. For example, returning to the Food Fair hypothetical, with the universe of information that would be available under the proposed rule, could the members assert a breach of the duty of fair representation if the union had failed to explore detailed financial

169. See *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

170. 323 U.S. 192 (1944).

171. *Id.* at 202-03.

172. *Id.* at 203.

173. 386 U.S. 171 (1967).

174. *Id.* at 190.

records and long-range forecasts of the enterprise and instead bargained for a handsome wage increase? How much information must a union request to protect all employees equally? Does a union's failure to request a particular piece of information constitute merely a negligent omission of its duty to bargain or does such a failure rise to the level of knowing discrimination?

The last question raises particularly difficult considerations when the failure to request a particular item of information affects one group of employees in an irrelevant or invidious fashion. This would be the case when there are a few older employees in a plant composed primarily of young married workers. The union presses for information regarding available types of medical coverage to see if it can work out an optimal family plan for its members, but neglects at this time to explore whether the various plans cover retired employees. The older employees may now be in the position to assert that the union's representation of their interests was unfair.

The second level at which the duty of fair representation may impose liability upon a union in the context of requests for disclosure involves the situation of a union requesting and obtaining information but either failing to use it all or putting it to an improper use. This instance—which may be described as a breach of commission, as distinguished from the breach of omission previously discussed—raises the question whether a union can totally deny the existence of certain information in its possession and proceed to bargain for increased benefits, without regard to the resulting effect on employees or enterprise stability. Such patent abnegation of relevant criteria surely would rise to the level of arbitrary, discriminatory, or bad faith conduct.

Somewhat different considerations arise in the normal context of a union operating in a conflict of interest situation, comprised of balancing the interests of particular groups of employees against the larger interest of the employees as a whole. When the union is armed with broader-based information to enable it to engage in more finely tuned bargaining, these differences become more apparent. In the instance of the plant in which the average age of the employee is fifty years old, should the union be put to the more stringent standard of showing the relevance of accepting a wage increase at the expense of lessened retirement benefits? Although the practical effects are difficult to envision since the present American system of labor-management relations has no experience with using broad disclosure, the union theoretically should be prevented from denying its obligations by avoiding information that might reveal the irrelevancy of bargained differences in the treatment of employees or might force the union to engage in a more difficult calculation during the next bargaining session. The situation could well arise in which a union would be put to the herculean task of defending each item or decision with hard-core data obtained or obtainable from management.

Furthermore, a union will be charged with developing the technical and analytical skills necessary to interpret the masses of information available to it. Given the burden, however minimal, placed upon management to supply the data, and the dangers of leakage if the materials are inadequately protected by the union, mere possession of information by the union, without more, seems pointless. As a result, it would seem just to equate possession of information with a union's need to engage in intelligent bargaining and to treat any failure to analyze obtained information in the same light as a decision to avoid any item of arguably relevant information.

Despite the appeal of holding a union liable in these situations, the likelihood of a member proving a violation would be small, absent some extension of at least the broad parameters of the information to the employees. Under Belgian law, the workers' representative to the enterprise council must furnish the information to the employees and must take steps to protect its confidentiality.¹⁷⁵ The West German statute, on the other hand, imposes this obligation on the employer.¹⁷⁶ At a minimum, a procedure by which the union members are informed of the categories of information that are obtained by the union would facilitate the ability of the employees to prove those instances in which the union had avoided or ignored relevant information or had otherwise acted in a proscribed manner.¹⁷⁷

While it appears clear that, in the context of a union's duty of fair representation, the standard of arbitrary, discriminatory, hostile, or bad faith conduct will remain the general rule,¹⁷⁸ it is less clear whether a mere negligent failure to request or use information will also constitute a breach of the duty.¹⁷⁹ Since a union will need to develop expertise in dealing with broadly disclosed information and will be unable at first to appreciate the depths to which the information can be used and its breadth of availability, imposition of a mere negligence standard at the inception of regulation would impose an unfair burden on the union. As the area becomes increasingly well defined, however, a negligence standard may prove to be the only appropriate way to insure that unions recognize the consequences of their obligation to their membership and to promote the successful inculcation of the ethos of cooperation.

Apart from considerations of the duty of fair representation, there is the possibility that extension of information to the employees may result in an impediment to the collective bargaining process. Conceivably, a union might encounter increased resistance to ratification of a proposed

175. See text accompanying notes 116-26 *supra*.

176. See text accompanying notes 103-15 *supra*.

177. Some type of discovery proceeding, such as that which is available when charges are filed asserting a breach of the duty of fair representation, should be made available.

178. See *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).

179. See GORMAN, *supra* note 45, at 719-21.

collective bargaining agreement that it has negotiated on behalf of its members. The rank-and-file is composed of various interest groups who, in an environment of broad disclosure, would have access to information to support their points of view. When the union can present a proposed contract in a sufficiently vague manner to cloud the choices that might have been available to it, it may have fewer problems of acceptance by the members. However, if it becomes more obvious to the membership that the union had another rational choice available to it, and if the members have information to support one alternative as opposed to another, they may be more reluctant to accept the choice arrived at by the union. Furthermore, if there is one interest group that merely wishes to stir up controversy, the act of giving to it more information will merely serve to exacerbate the debate and to confuse the issues prior to ratification. The potential result of this is an inability by the various groups to appreciate the necessary compromises that are reflected in any tentative labor contract.

Thus, labor also will emerge from any attempt at regulation with added burdens. It must also be subject to heightened obligations and liabilities to insure that it comprehends and acts in accordance with the responsibilities attending broad disclosure. A recognition of the weightiness of these concerns and of the potential for abuse by both labor and management can serve to deepen appreciation for the benefits of cooperation between union and management and to make disclosure a successful tool of labor relations.

IV. CONCLUSION

Any system of collective bargaining is premised upon an underlying assumption about the relationship of the parties to the bargaining process. That assumption can take the form of one of two competing models of labor relations, which in turn affects the rules by which the parties must live. The cooperative model views collective bargaining as the means to achieving ends that are mutually beneficial to management and labor. The confrontation or antagonistic model, on the other hand, views collective bargaining as an adversary process in which there can be but one victor and the parties must fight it out to determine who will be the winner.

The form that regulation of disclosure follows must be predicated upon the model that the system has adopted. At present, American labor relations are entrenched in the antagonistic model and all rules have been framed with that model in mind. The interesting questions arise when one considers using disclosure as a device to move subtly from antagonism to cooperation without causing any strife to the collective bargaining relationship as a whole. That is, while a requirement of wide-open disclosure ideally may serve the ends of cooperation, in an antagonistic system it may work merely as a device to harass management into

providing reams of data that will remain unused. If, however, disclosure is subject to reasonable limitations and sanctions for noncompliance or miscompliance, and if the parties are forced into both disclosure and acceptance of the information regardless of their desires, then they may be forced into a more rational decision making process and into a gradual change of perspective.

Full disclosure of economic and financial data makes possible a more rational collective bargaining system that enables unions to assess and evaluate management proposals knowledgeably and to frame their own demands realistically. Whereas present collective bargaining practice places a premium on gamesmanship and secrecy, bargaining through full disclosure facilitates reasoned and informed decisionmaking. It is proposed that the NLRB systematize and expand present disclosure requirements by promulgating administrative rules pursuant to its statutory rulemaking power. The adopted rules should provide that the duty to disclose is triggered by a union request for information subject to legitimate employer defenses.

An important benefit of the proposed disclosure rules is the prospect that the openness and mutuality of interest underlying the proposed rules will carry over into other areas of labor-management relations. It is vital that the parties to collective bargaining recognize their interdependence instead of engaging themselves in antagonistic posturing.

The proposed disclosure rules interpose a higher level of labor-management cooperation into the collective bargaining process. With the seed of cooperation thus planted, labor and management can determine whether cooperation can form the future basis for American labor relations.

